No. 2437

In The
United States Circuit Court of Appeals
For the Ninth Circuit

UTAH IMPLEMENT-VEHICLE COMPANY, a Corporation

Appellee.

vs.

D. W. STANDROD & COMPANY, a Corporation, as Trustee for Idaho Lumber Company, Ltd. and Geo. A. Lowe Company, Corporations.

Appellant.

Brief for Appellant

WILLIAM A. LEE,
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..... Attorney for Appellee.

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Appellant.

Appellant's Brief

STATEMENT

This is an appeal from a judgment and decree of foreclosure in favor of appellee, the Utah Implement-Vehicle Company.

A statemnt of the case is found in the decision of the lower court (pp. 64-66 record) as follows:

"DIETRICH, District Judge:

"A very brief statement of the facts will "suffice to make clear the nature of the single "question which has been argued and submitted "for decision. The suit is brought to foreclose "a mortgage given to the plaintiff by N. C. Mick-"elson on the 6th day of February, 1911, to se-"cure the payment of a promissory note of the "same date for $12,575.75, which mortgage was, "on February 21, 1911, recorded in the office of "the County Recorder of Bingham County, Ida-"ho, where the property is situate. Mickelson "later became a bankrupt, and his Trustee is "made a party defendant. The other de-"fendant, D. W. Standrod & Company, a "corporation, is the Trustee for the Idaho "Lumber Company and others, who claim liens

"upon or equitable interests in the mortgaged "property. It is unnecssary to explain the nature "of this trust further than to say that the inter- "ests of all beneficiaries thereof save one orig- "inated in mechanic's liens for services rendered "and materials furnished in the construction of "a building upon a portion of the mortgaged "premises. The original validity of these liens "is not now called into question, and for the "purposes of the decision it is assumed that in "due time the several parties filed their claims "of lien in the form prescribed by law, and that "within the statutory period they commenced pro- "ceedings in the proper state district court to "enforce the liens, and that such suits were con- "solidated, and later a decree was entered ad- "judging the several claims to be liens upon the "property of the mortgagor, and that thereafter "the property was duly sold to satisfy the "amounts adjudged to be due, at which sale "Standrod & Company became the purchaser, "as Trustee for all concerned. It is further as- "sumed that while some of these claims were "filed with the Recorder shortly before and some "after the execution and recording of the plain- "tiff's mortgage, by relation the liens may have all "antedated the lien of the mortgage. Although "its mortgage was of public record when they "were commenced, the mortgagee, the plaintiff "here, was not made a party to the lien suits, and "its contention now is that therefore not only is "it not bound by such foreclosure proceedings, but "also that through lapse of time the liens have "been lost, and as to it they are no longer of any "validity.

"The precise question, therefore, is, whether "or not a lien claimant under the mechanics' lien

"law of Idaho loses his priority of lien as against "a junioir mortgagee, by foreclosing his lien "without bringing in and making a party to such "foreclosure suit the mortgagee, the period pro- "vided by the statute in which proceedings may "be commenced for the enforcement of the lien, "expiring during the pendency of the suit."

Appellant supplements this statement made by the court below by adding that the appellant, for its *cestui que trusts,* Idaho Lumber Company, Geo. A. Lowe Company, and E. E. and F. C. Rodgers, paid off and discharged the prior lien for taxes and the laborers' liens of P. J. Johnson and D. F. Hagans at the foreclosure sale in the State Court had on January 4, 1912, and prior to the commencement of this action. The mortgage lien of E. E. and F. C. Rogers having been upheld by the court in this action as being prior to appellee's mortgage they did not join in this appeal, and a severance as to them, and also as to the trustee in bankruptcy, Frank C. Bowman, was granted. (p. 96 record.) Frank C. Bowman, trustee in bankruptcy, did not answer in this action, but agreed with appellee not to enter an appearance or defend in these foreclosure proceedings, (p. 45 record) but did file a reply to appellant's supplemental pleading. (pp. 53-63 record.)

Plaintiff makes the following assignment of errors:

ASSIGNMENT OF ERRORS.
(pp. 97-100 record.)

"D. W. Standrod & Company, a corporation, as Trustee for the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, defendant and appellant herein, on behalf of and in so far as the interests of said

*cestui que trust*s are affected by the judgment and decree entered in the above entitled court and cause on the 2nd day of December, 1913, and by the trial, proceedings and orders had and made leading up to said judgment, hereby assigns errors in the following particulars:

I.

Because the Court holds and decides that the Idaho Mechanic's Lien Law, Section 5118, R. C. Idaho, 1907, which provides that no lien shall bind any building, etc. for a longer period than six months after the claim has been filed, unless proceedings be commenced to enforce such lien should have interpolated therein after the word "commenced" the additional words "against the person. or persons, against whose interests the lien is asserted."

II.

Because the Court refused to hold that under the Idaho Mechanic's Lien Law a lien would continue to bind the property if an action was commenced in a proper court within six months after the same was filed, against the owner of the property.

III.

Because the Court holds and decides that under the Mechanic's Lien Law a lien is barred against all subsequent mortgagees not made parties to an action to foreclose such lien within six months from the time the same is filed.

IV.

Because the Court refuses to give any effect to Section 5114, R. C. Idaho, 1907, which prefers

a mechanic's lien to a mortgage or encumbrance attaching subsequent to the attachment of such lien holder's claim.

V.

Because the Court holds and decides that the judgment and decree and order of sale and sale thereunder, obtained and had in the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, to enforce the respective mechanic's liens of the Idaho Lumber Company and Geo. A. Lowe Company and all proceedings had in said State Court thereunder, were void as against plaintiff and respondent, because it had not been made a party to said proceedings in the State Court.

VI.

Because the Court did not hold that plaintiff's and respondent's action to foreclose its mortgage should have been an action in equity to permit it to redeem as against defendant's and appellant's foreclosure and sale under the decree obtained in the State Court.

VII.

Because the Court, by its judgment and decree entered December 2, 1913, held and decided in favor of plaintiff and respondent and against appellant and defendant, representing as Trustee the interest of said *cestui que trusts.*

VIII.

Because the Court held and decided that the premises sold under the decree and order of sale made by the State Court be sold under this decree and proceeds under said second sale be first

applied to the payment and discharge of the E. E. and F. C. Rodgers mortgage lien, and that thereafter the remainder of said proceeds be applied to the discharge of plaintiff's and respondent's mortgage lien, and that as against plaintiff's and respondent's said mortgage defendant's and appellant's judgment and decree obtained in the State Court was null and void.

IX.

Because the Court held and decided that defendant and appellant should be denied any relief under its petition filed October 15, 1913, and did not hold that plaintiff's and respondent's lien was void as an unlawful preference, or that said issue as thus raised should be first heard and determined, and because it permitted its Trustee in Bankruptcy, Frank C. Bowman, to dismiss the action that he had previously brought to set aside plaintiff's and respondent's mortgage, and permitted its said Trustee, Frank C. Bowman, to agree with the plaintiff and respondent that for a money consideration he, the said Frank C. Bowman, as Trustee, would not defend against, or contest, plaintiff's said mortgage, and in holding that defendant's and appellant's *cestui que trusts* were not entitled to be heard upon the issue as to the validity of plaintiff's mortgage and the right of said Trustee in Bankruptcy to dismiss said action and his stipulation not to defend against plaintiff's mortgage."

The questions presented by the first eight assignments may all be included in this single proposition:

Under the provisions of the Idaho Mechanic's Lien Law must a lien claimant in addition to commencing an action to foreclose the same

against the owner of the property within the six months prescribed by the statute, also commence an action against all other persons claiming subsequent liens, by mortgage or otherwise, upon the property against which the lien is asserted?

The learned trial judge in his decision (pp. 69-70 record) again states the proposition thus:

"The real question, therefore, is, whether or not the commencement of a proceeding against one party in interest operates to keep alive the lien as to all parties in interest. It will be observed that Section 5118 does not purport in terms to prescribe who shall be made parties to the suit, either plaintiff or defendant, and in giving to it a practical construction it is necessary to interpolate a designation or description of the parties. Defendant would make the clause, "unless proceedings be commenced in a proper court, etc.," read, "unless proceedings be commenced in a proper court *against the owner of the property, etc.*," whereas the plaintiff would have it read, "unless proceedings be commenced in a proper court *against the person or persons against whose interests the lien is asserted, etc.*"

ARGUMENT

That part of the Revised Codes of Idaho, 1907, material to this controversy is as follows:

"Section 5118. No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed unless proceedings be commenced in a proper court within that time to enforce such liens, etc."

"Section 5114. The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance, etc."

Section 5120 classifies the various kinds of liens and prescribes the order in which the courts shall give them preference, the order being:

1. All laborers other than contractors or subcontractors.

2. All material men other than contractors or sub-contractors.

3. Sub-contractors.

4. The original contractor.

"Section 5121. Any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them, etc."

"Section 5124. Except as otherwise provided in this chapter the provisions of this Code relating to civil actions new trials and appeals are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter, etc."

Proceedings to foreclose a mechanic's lien under the Idaho law is a proceeding in equity.

Idaho & Ore. L. I. Co. vs. Bradbury 132 U. S. 509.

Robertson vs. Moore, 10 Ida. 115; 77 Pac. 218.

A settled canon of construction is that if a statute is valid it is to be given effect according to the purpose and intent of the law maker, and the intention is to be ascertained by considering the entire statutory law relating to that subject.

Sutherland on Statutory Construction. Secs. 234 and 239.

From the language of the various provisions relating to mechanic's liens, as well as the settled practice in Courts of the State, it is clear that the law intends and does prefer a mechanic's lien to any mortgage or other incumbrance which may attach subsequent to the time when the structure was commenced, work done, or material furnished.

The section of the statute giving the right to a lien is as follows:

"Section 5110. Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, etc. * * * or performing labor in any mine, etc., has a lien upon the same for work or labor done or material furnished, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, etc."

The decision of the Court below (pp. 65-76 record) very ably sets forth the reasons for the conclusions reached by the Court. It would be difficult to make a better presentation of appellee's contention than has been done in this opinion, but with all due respect to the learned Judge, who reaches the conclusion that this is the construction that must be given to these various provisions of the Mechanic's Lien Law, we do not think that such was the intention of the Legislature. It is scarcely believable that after the law making power has, during a long serious of years, followed a policy of extending the right to file liens, making them preferred above mortgages, giving lien claimants rights not allowed in most other states, such as the right to recover attorney's fees, for their enforcement without a reciprocal right to the defendant, and generally surrounding this class of liens with every pro-

vision favorable to the lien claimant, that it, in fact, intended the law to be what this decision holds it to be.

Under this construction of the lien law, a laborer having a right to a lien for a modest sum of only a few dollars upon an extensive line of work, such as a railroad or large irrigation works, must, at the peril of losing his claim, be put to the expense of bringing into court all other lien claimants, however numerous, whether by mortgage or subsequent liens, when he seeks to enforce the same. This consideration may not be of much value in determining what the law-making power actually has done with regard to declaring who are necessary parties in a lien foreclosure, but it is a cogent reason in the mind of all familiar with the general policy of both the Legislature and the Court as to why no such requirement was intended.

Under the construction contended for by appellant no injustice is worked upon the holder of a subsequent lien or mortgage. For he is given the right to intervene in the foreclosure proceedings, or may bring an independent action to redeem, and in such action he has the right to challenge the validity of a lien as effectively as in a direct proceedings to foreclose.

It is not controverted that the holder of a subsequent mortgage lien need not be made a party to the foreclosure of a prior mortgage, but it is urged that he is a necessary party to the foreclosure of a prior mechanic's lien, and must be brought into the suit within the six months limitation or the lien holder loses all rights against such subsequent mortgagee. A reason suggested by the decision (p. 72 record) is that disputes not infrequently arise between mortgagees and lien claimants that a lien often rests

entirely in parol, etc. is not entitled to great weight. In the one case the mortgagee's lien arises by agreement of parties; in the other it is created by law upon the happening of certain events. In either case subsequent mortgagees may ordinarily challenge the validity of such prior incumbrance upon any ground that the owner might have done.

If the holder of a prior mortgage forecloses the same without making the holder of a subsequent mortgage a party, the latter would not thereafter in a proper proceeding be prevented from contesting the validity, priority or amount of such mortgage, and the same right exists with reference to a mechanic's lien under like conditions.

As said by the learned Judge, the decided cases are not entirely in unison.

We assert with much confidence in the correctness of our position that a careful analysis of practically all of the decisions of the State Courts that have announced a doctrine contrary to our contention have done so by reason of the statutes of such states relative to the foreclosure of mechanic's liens being radically different from the Idaho laws.

We are equally certain that the decisions of the Courts cited below which support our contention are decisions that are based upon statutes essentially the same as the Idaho law.

De La Vergne Refrigerating Company vs. Montgomery Brewing Company, 6 C. C. A. 272; 57 Fed. 111, sets forth and construes several sections of the Alabama Code relating to mechanic's liens and foreclosure proceedings thereunder.

"Section 3041. Limitations. Except in cases hereinafter provided, all liens arising under this

chapter shall be deemed lost unless suit for the enforcement thereof is commenced within six months after the maturity of the entire indebtedness secured thereby."

There is no essential difference between this provision in the Alabama Code and Section 5118 of the Idaho Code above quoted.

There is a marked similarity between the provisions of Sections 3018, 3019 and 3030 of the Alabama Code set forth in the opinion *haec verba* and Sections 5110, 5114 and 5121 of the Idaho Code.

After quoting Section 3041 the opinion proceeds to state:

"Our opinion is that Section 3041 has no application to incumbrancers, but refers only to suits against the owner or proprietor. The proceedings as to incumbrancers is governed by Section 3030, which confers upon the material man the right either to join incumbrancers, or to omit them. He is authorized but not required to make them parties. Trammell vs. Hudman, 78 Ala. 224 If suit for the enforcement of a lien be commenced against the owner or proprietor within six months after the maturity of the indebtedness secured by it, the lien is not lost; and our opinion is that incumbrancers may at any subsequent time be made parties to the proceeding."

"In Monk et al. vs. Exposition Deepwater Pier Corporation, et al., 68 S. E. 280. (Sup. Ct. App. of Va. June 9, 1910.) the Court says:

"In other words, the holding amounts to this: That though a suit to enforce a mechanic's lien is brought within due time against the debtor upon whose property the lien rests, the failure to implead subsequent lienors within six months defeats the lien so far as such incumbrancers are concerned.

"This is plainly an erroneous construction of the mechanic's lien act. There is no statutory requirement that subsequent incumbrancers shall be made parties, and, though they are *proper parties*, they are not *necessary parties* to such suit."

The opinion quotes somewhat at length the provisioins of the Virginia statute, and it is apparent that the law relative to mechanic's liens and foreclosure of the same is similar to the provisions found in the Idaho Code.

The Court cites De La Vergne Refrigerating Co. vs. Montgomery Brewing Company, *supra*. and adds "The United States Circuit Court of Appeals of the Fifth Circuit in construing the Alabama statute, which is substantially the same as the Virginia Act, says that if suit for the enforcement of a lien be commenced against the owner within six months * * * the lien is not lost, etc."

Cornell vs. Conine-Eaton Lumber Company, 47 Pac. 912. (Ct. App. Colo. Dec 14, 1896.

The Court says:

"It is contended by counsel for appellant that he was an indispensible party, and that not having been made a party in the lien proceedings, he is not concluded by them, nor his title in any way affected. The validity of this claim is the only question presented for determination in this case. The proceedings to create and enforce liens of mechanics, etc., is purely statutory. Any material departure from the provisions of the statute invalidates the proceedings. But like all other cognate acts, Courts are required to liberally

construe the statute to effectuate the intention of the legislature and gives the beneficiaries under the act the right and remedy sought to be established."

The opinion then sets forth the provisions of the Colorado Code at length. An examination of these provisions will show that there is a marked similarity between the Colorado Code and the Idaho Code relating to the claim and enforcement of mechanic's liens. I direct particular attention to this for the reason that the learned trial Judge in commenting on case at bar, says:

"It is made clear that the conclusion reached was the result largely, if not entirely, of the emphasis placed upon a provision of the statute not found in the Idaho Law." (p. 74 record.)

Doubtless reference is here had to the provisions of Sections 2153 of the Colorado Code quoted in the second column of page 913 as follows:

"The owner of the property to which such lien shall have attached shall be made a party to the action."

It has never been suggested that under Section 5118 of the Idaho Code a foreclosure proceedings could be maintained without making the owner of the premises a party, and the Colorado Code provision found in Section 2152 is therefore only a statutory declaration of what is universally conceded to be a requirement of the Idaho Code.

Section 2161, Section 16 c. l. laws, 1887; Section 17; Section 22, and Section 2149 of the Colorado Code have their exact counterparts in the Idaho Code.

While the learned Judge below was unable to attach much weight to the Colorado decision by reason of the supposed dissimilarity of the laws

of the two states, as tending to sustain his views, in the next paragraph he cites Dunphy vs. Riddle, 86 Ill. 22; Crowl vs. Nagle 86 Ill 437; McGraw vs. Bayard, 96 Ill. 146, (p. 75 record.)

In this connection we direct the attention of this court to the language in De La Vergne Refrigerating Co. vs. Montgomery Brewing Co. *supra.*, wherein that court says:

"The Illinois cases cited by the counsel for the appellees have no application here. Reference to them will show that the court was construing a statute of that state which, the court says, requires that material men shall enforce their rights against all parties (creditors or incumbrancers) having, or claiming to have, an interest in the premises, by suit to be commenced against them within six months, and that the law means that parties having an interest shall be parties to the suit, etc."

In Monk vs. Exposition Deepwater Pier Corporation, *supra*, that court says at page 281, column 2,

"The cases relied on by counsel for the appellees are controlled by local statutes, and have no application to a case arising under the Virginia statute, the provisions of which are essentially dissimilar."

In Cornell vs. Conine-Eaton Lumber Co., *supra,* at page 914, the court says:

"The diffrence between the statutes of Illinois, under which the decisions were made, and our statute is very marked."

And the opinion proceds at great length to point out the distinction, and quotes Phillips on Mechanic's Liens, Section 397, wherein that author says:

"A mortagee is not an owner within the meaning of the mechanic's lien law, and is not

entitled to notice of a suit upon a lien claim. The owner, under such a statute, of the legal estate is alone to be made a party."

And again the opinion reads:

"Liens being purely creatures of statute, Mr. Phillips cites and discusses the statutes of several states, in some of which mortagees are specifically made necessary parties; but when discussing statutes like our own where there is no provision requiring them to be made parties, he clearly states as in the paragraph above cited, that a mortgagee is not within the meaning of the mechanic's lien laws, and is not entitled to notice of a suit upon a lien claim."

It is quite apparent from the excerpts above given that the learned trial Judge in this case has fallen into the error of basing his conclusions largely upon a line of authorities that should be given no weight whatever by reason of a marked dissimilarity in the statutes of the states from whence such decisions come.

As authority tending to support the contention of appellant not much weight was given by the court below to the following cases:

Gaines vs. Childers, (Or.) 63 Pac. 487.
Whitney vs. Higgins, 10 Cal. 547; (Pac St. R. Book 3, Vol. 10 Cal. 547, and note, to case p. 531.)
Gamble vs. Voll, 15 Cal. 507; (Pac. St. R. Book 5, Vol. 15 Cal. 507.)

Gaines vs. Childers, *supra,* was decided June 7, 1901, the opinion being by Bean, C. J., and while the conclusion reached by the court might have been done without necessarily determining the question involved in this appeal, it is evident

from an examination of the opinion that this was the principal question considered. There can be no doubt about the opinion supporting plaintiff's contention in this case and in unequivocally holding that Section 415 of the Oregon statute, which provides "Any person having a lien subsequent to the plaintiff upon the same property, or any part thereof, * * * shall be made a defendant in the case," does not require the lien claimant to make subsequent mortgagees parties to a foreclosure at peril of losing his right of lien against such parties.

And the learned Judge proceeds to say, after quoting 9 Enc. Pl. & Prac. 300:

"If incumbrancers are not made parties to a suit to foreclose a lien they are, of course, in no respect bound by the decree or proceedings thereunder; but the decree itself is valid, and vests in the purchaser the legal right to the premises and the right in a proper proceeding to compel such lien creditors to redeem."

After citing the following authorities in support of this proposition, Sellwood vs. Gray, 11 Or. 534; 5 Pac. 196; Koerner vs. Iron Works, 36 Or. 90; 58 Pac. 863, the court proceeds to say:

"The same is true in a suit to foreclose a mechanic's lien. Persons holding liens upon the premises by judgment or mortgage are not indispensible parties to such a suit. The only effect of not joining them with the owners of the premises is that the decree is not binding upon them, and does not cut off or deprive them of the right of redemption."

He then gives as supporting this proposition the California cases above cited.

It is also true that Whitney vs. Higgins, *supra* might have been finally determined without a decision of the particular question here involved.

But the opinion of Field, Judge, is of interest as tending to show that the Court made no distinction between the foreclosure of a mortgage and a mechanic's lien in respect to who should be parties, for it says:

"A mechanic's lien is purely the creature of statute. A decree for the sale of the premises in its enforcement has the same and no greater effect upon the rights of purchasers and incumbrancers prior to the commencement of the suit than a similar decree would have upon the foreclosure of a mortgage."

As we have observed, three of the courts above mentioned have specifically pointed out why the Illinois decisions are not of any value in determining the question here presented because of the dissimilarity of its laws. We have endeavored also to show that the laws of the states from whence these decisions arose supporting appellant's position were in all essentials like those of Idaho.

The statutes of all the different states from whence the authorities are cited as tending to support appellee's position are not at this time available to the writer hereof, and it may be that the statute law from some of these states is similar to the Idaho law. If so, then in the language of the learned trial Judge, "it is a question upon which the decided cases are not entirely in unison."

So far as we have been able to ascertain, this precise question has never been decided by a Federal Court except in the one case above referred to. Refrigerator Co. vs. Brewing Co. 6 C. C. A. 272; 57 Fed. 111, *supra*

In the uate case of Davis vs. Bartz, 118 Pac. 334 (Sup. Ct. Wash. October 24, 1911,) much re-

lied upon by appellee, the opinion does not indicate any radical difference between the Washington statutes and the Idaho law relating to mechanic's liens.

It should be observed, however, that a determination of this question was not necessary to a decision in that case because the court does hold that the appellant was estopped from asserting a priority under his lien by reason of having himself first taken the mortgage and subsequently assigned the same, which he was seeking to defeat. Upon every consideration of equity he might have been denied relief upon this ground alone.

In the opinion the court says that its attention had not been called to any adverse authority except the case of Cornell vs. Conine-Eaton Lumber Company, 9 Colo. App. 225; 47 Pac. 912. above referred to, thus indicating that in Davis vs. Bartz, supr that the case was not thorough briefed.

In that case the court attaches much significance to the Indiana cases referred to. An examination of these cases will sow that they are not founded upon any authority outside of the courts of that state and appear to be based upon a former ruling made by that court to the effect that the foreclosure of a prior mortgage has no effect upon a junior mortagee not made a party to such proceedings.

Un. Nat. Sav. & L. Ass'n. vs. Helberg, 51 N. E. 916.

The Nebraska authorities given are not entitled to much weight because that court has held both ways on the question.

Manly vs. Downing, 15 Nebr. 637; 19 N. W. 601.

Under the peculiar statutes of that state that court has held that foreclosure proceedings begun against the owner are not binding upon his subsequent grantor, even when the mortagee has no notice of such change in interest.

It is a very general and well settled rule of law that a lien claimant, by mortgage or otherwise, whether he be prior or subsequent, is not bound by a foreclosure proceedings to which he was not made a party. But there is no reason in equity why a prior lien holder, whether by mortgage or mechanic's lien, should have his foreclosure proceedings against the owner and his sale thereunder declared a nullity, and his cause of action barred against a subsequent lien holder who stood idly by and refused to intervene in such action, or bring an independent action. Such subsequent lien holder should be permitted to redeem, and the better reason and the better considered authorities so hold, under statutes similar to the Idaho law.

This is the rule announced by Justice Field, concurred in by Terry and Baldwin, in Whitney vs. Higgins, *supra*. It is a leading case and very frequently cited by courts and text book writers of the present day, and has not been overruled, criticized or modified, so far as we have observed.

The doctrine that subsequent incumbrancers not made parties to a foreclosure proceeding by the holder of a prior incumbrance or lien, "are in no wise affected by the decree and their liens remain unimpaired" is too broad a statement of the principle.

The correct doctrine is stated in the carefully considered case of Carpentier vs. Brenham, 40 Cal. 221, (Pac St. R. Vol. 13, 221.) wherein the court announces the rule as follows:

(Page 235.) "The point seems to be that the plaintiff should not be compelled to redeem the first mortgage, because it has become merged in the legal title by a proceeding which the plaintiff disavows and holds for nought.

"But in the first place the foreclosure in favor of Moss is not void, and in the second place Moss, the purchaser at the sale, did not, as against the plaintiff, merge his equitable rights as a first incumbrancer in the legal title. The Moss decree is not void. It is not absolutely essential to make subsequent incumbrancers parties to a foreclosure suit. If not so made, they are not bound by the decree, but they are not necessary parties as between the mortgagor and the mortgagee, and in many cases where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so. (Montgomery vs. Tutt, 11 Cal. 307.) Subsequent incumbrancers are not necessary, though proper parties, to an action to foreclose a mortgage. (14 Cal. 549; Story Eq. Pleadings, 196; 33 Cal. 32.)

"The decree, therefore, is valid for every purpose, except that it cannot be used to deprive the representatives of Catharine Hayes (holder of second mortgage) of any rights she possessed when the Moss suit was brought, or the decree therein entered."

(Page 236) "When the mortgagor and mortgagee contract, the former agrees, that, in case of a breach of the agreement on his own part, the latter shall sell the land, and that the purchaser at such sale shall acquire the legal title, relieved of the lien, as of the date of the execution of the mortgage. A subsequent mortgagee knows of this relation between the parties, and what he agrees

to accept as a security for his money is a claim upon the surplus of the proceeds of the first foreclosure sale beyond the prior debt. He has no estate in the land itself, nor any lien upon the land, except subject to the prior lien, that is he has a right to be paid out of the excess; that is, in effect a right to redeem, and incidentally—if made a party to a foreclosure suit—a right to defend by pleading the Statute of Limitations, or the invalidity in whole or in part of the plaintiff's claim, or that it is paid. These are not, however, substantive and primary defenses, but grow out of his right to redeem.

(Page 237) "But if the junior mortgagee shall bring his senior into Court, shall he be permitted to ignore his claims as senior mortgagee? The right then of the plaintiff as against the purchasers at the Moss foreclosure sale, was a right to redeem."

In Frates vs. Sears, 144 Cal. 246; 77 Pac. 905, the Court refers to Carpentier vs. Brenham, *supra*, and apparently criticizes the doctrine there announced for it says:

"If the court meant to hold that plaintiff could not avail herself of the Statute of Limitations as against the first mortgage by reason of the foreclosure of the first mortgage, we are inclined to distrust the logic of that opinion. It was clear on the facts of the case that more than four years had elapsed after the judgment of foreclosure on the first mortgage before the suit on the second mortgage was begun, and that at the beginning of the latter suit the time limited by law for suing on the first mortgage had fully elapsed."

But Carpentier vs. Brenham holds clearly that the bringing of an action to foreclose by the prior incumbrancer prevents the statute from

running against his mortgage and in favor of the subsequent incumbrancer. Both upon principle and by the great weight of authority this is the better doctrine. Otherwise all subsequent incumbrancers would be as necessary in a foreclosure proceedings by the prior mortgagee as would be the mortgagor, and all of the authorities to the effect that subsequent lien holders are proper but not necessary parties would be misleading and simply invite a course of procedure that would result in the first lien holder finally losing his interest in the mortgaged property.

That is to say, if the rule that a subsequent mortgagee is not bound by a foreclosure proceedings to which he is not a party, brought by the prior mortgagee against the owner and that it does not in any manner affect the rights of such subsequent mortgagee, then he is a necessary party as much as the mortgagor. Otherwise the Statute of Limitations would run in his favor in the same manner that it would run in favor of the mortgagor, and upon so running his lien would become the first and the only effective title against the property, and the rights of the prior mortgagor, although foreclosed against the owner, would be void against the subsequent mortgagee, who, as said in Carpentier vs. Brenham, *supra,* took his second mortgage knowing the relations between the mortgagor and the prior mortgagee, and agreed to accept as his security a claim upon the surplus.

In Monk et al vs. Exposition Deepwater Pier Corporation supra, the Court says:

"It is true that in some cases one creditor may set up the staatute of limitations to defeat the demand of another creditor against the common debtor; but to sustain such plea it is essential to show that the co-creditor's debt is barred as be-

tween himself and his debtor. McCartney vs. Tyrer, 94 Va. 198; 26 S. E. 419; Callaway's Adm'r. vs. Saunders, 99 Va. 350, 38 S. E. 182.''

We are unable to see wherein Hassal vs. Wilcox, 130 U. S. 905; 9 Sup. Ct. Rep. 590, supports appellee's contention herein. In that case Wilcox, the lien claimant, had apparently by collusion with the president of the railroad secured a judgment in the state court, by what was in effect an *ex parte* proceedings, for an alleged mechanic's lien under the somewhat unusual provisions of a Texas statute, that is conceded in point of time to have been subsequent to the plaintiff' bond holders mortgage. In a foreclosure proceedings by a representative of the bond holders' interest the court held that the judgment of the state court was not conclusive against the interest of the bond holders. It would be difficult to understand how upon any equitable principle a different conclusion could have been reached under the unusual facts of that case.

II.

IX ASSIGNMENT OF ERROR.

The ninth assignment of error is based upon the refusal of the court to grant appellant any relief under its supplemental petition filed October 15, 1913.

A brief statement of the facts relative thereto will present the alleged errors predicated upon the court's ruling.

This case was tried October 15, 1913, at Pocatello, Idaho. As is well known, the principal seat of this court is at Boise, Idaho, and the files for the other divisions of the District are taken by the Clerk to the place of holding the term. On September 23rd preceding the trial of this case

appellee served its reply to appellant's answer and cross-complaint, and for the first time appellant was advised of the facts set forth in paragraph 12 of said reply.

We maintain that the admitted facts as they appear from appellee's reply (pp. 44-45 record) appellant's pleading (pp. 47-51 record) and the supplemental pleading of Frank C. Bowman, trustee in bankruptcy for the bankrupt Mickelson (pp. 53-56 record) establish this state of facts:

(1.) That prior to the commencement of this foreclosure proceedings Frank C. Bowman, as trustee for the bankrupt Mickelson, began an action in the U. S. District Court against the appellee who was defendant in such action to set aside and vacate appellee's mortgage for the reason that the same was voidable and in conflict with the act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," and particularly Sections 60a and 60b thereof, for the reason that such mortgage constituted an unlawful preference.

(2.) That in said complaint it was further charged by said trustee that the appellee had been given a mortgage by the said bankrupt, Mickelson, for the sum in excess of the indebtedness owing by Mickelson to it for $4000.00.

(3.) That at great expense to the creditors of said estate testimony was taken tending to establish said allegations and issue joined in said action.

(4.) That the trustee found by a personal examination of the books of appellee, the defendant in said action, that it had taken this mortgage from the said bankrupt Mickelson shortly prior to

his being adjudged a bankrupt, for the sum of $2800.00 in excess of what he rightfully owed it.

(5.) That subsequent to this and prior to appellee bringing this action to foreclose its said mortgage it paid to said trustee in bankruptcy the sum of $800.00 for and in consideration that said trustee would not resist or defend against foreclosure of appellee's said mortgage, and that he would dismiss the action then pending and at issue brought to set aside and avoid said mortgage upon the grounds in his bill of complaint stated.

(6.) That upon appellant being advised of these conditions just prior to the trial of these foreclosure proceedings it sought by its supplemental pleading to have the same held in abeyance until the action theretofore dismissed by the trustee could be reinstated and heard, or in the event that the stipulation between the trustee and appellee was not vacated and the trustee ordered to proceed with said cause of action, then and in that case that appellant be permitted to do so.

We submit that under the state of the record as it appears from the conceded facts referred to in the record, that appellant was entitled to a hearing upon the issues presented by appellee's reply, its supplemental pleading, and the supplemental pleading of the trustee in bankruptcy, that the direct result of the court's ruling in denying this relief resulted in the $800.00 paid by the appellee to the trustee in bankruptcy being diverted from the mortgage security that belonged to the lien holders of this property, and transferring the same to the common creditors.

Upon the record here presentd, and for the reasons herein assigned, appellant asks that the

judgment be reversed and all proceedings had thereunder be vacated.

Respectfully submitted,

WILLIAM A. LEE,

Attorney for the Appellant, D. W. Standrod & Company, Trustee for the Idaho Lumber Company, Ltd., and Geo. A. Lowe Company.